IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL REVISION APPLICATION NO.76 OF 1995

Monica Badan Dham ...Applicant

vs.

Akhtar Hasan Rizvi & Ors. ...Respondents

Mr.M.A.Irani for the Applicant
Mr.Majeed Memon with Mr.I.A.Shaikh and Subhash Kanse for Respondent Nos.1 and 2
Mr.K.V.Saste,A.P.P. for State

CORAM: A.S.OKA,J.
DATE : AUGUST 18,2005

ORAL JUDGMENT:

1. On the last date, submissions of the Advocates of the parties were concluded. Today the Revision Application is kept for dictation of Judgment.

2. The challenge in this Revision Application is to the impugned Judgment and Order dated 6th August 1994 passed by the learned Metropolitan Magistrate, 23rd Court, Esplanade, Mumbai by which the Respondent Nos.1 and 2 (original accused) were acquitted of the charge of offence punishable under Sections 365, 394, 452 read with Section 34 of the Indian Penal Code and/or in the alternative read with Section 107, 109 of I.P.C.

3. With a view to appreciate the submissions made by the learned Counsel appearing for the parties, it will be

necessary to briefly refer to the facts of the case. F.I.R. is registered at the instance of one Michael Ignatious Gonsalves. The first informant was staying in a house which was owned by his sister Smt.Matilda Gonsalves. The said Smt.Matilda had constructed a house on ancestral property some time in the year 1964-65. According to the case of the prosecution, the said property on which the House was constructed was owned by the great grand father of the said Michael Gonsalves. The father of the said Michael and the said Smt.Matilda were not given any share in the property. After the death of great grand father of the first informant, the uncles of the first informant gave the house in question to the father of the first informant for the purpose of residing there. According to the case of the prosecution, Smt.Matilda constructed a house on the said property and she gave one room to the first informant for staying there and rest of the house was in possession of the said Smt.Matilda.

4. The Respondent No.1 is a professional builder who started construction of a building some time in the year 1988 on the adjoining plot near the said house. On or about 25th March 1988, the first informant Michael was called by the Respondent No.1 to his office. The Respondent No.1 informed the first informant that he had some settlement with Smt.Matilda and Michael should sign certain papers. However, as Michael was not aware of the contents of the documents on which signature

was sought, he declined to sign the papers without consulting someone. According to the case of the said Michael, on the advice of his cousin, he lodged N.C. complaint against the said Respondent No.1 on the basis of apprehension of dis-possession at the hands of Respondent No.1.

5. On 11th July 1988 at about 2.00 p.m., the said Michael had gone to a grocery shop. While returning, a watchman engaged by the Respondent No.1 informed him that his boss has called the said Michael. When Michael reached the building which was being constructed by the respondent No.1, two persons met him and stated that they were desirous of talking to the said Michael. When Michael refused to have any dialogue with them, one of them caught hold of the shirt of Michael and the other person gave a fist blow on the face of Michael. They dragged the said Michael to autorickshaw and he was put in autorickshaw. Michael was taken to the office of Respondent No.1 in a A.C.room where he was made to sit. After some time, the Respondent No.1 came there and tried to explain Michael that the Respondent No.1 was ready to give him residential premises and money. An assurance was given by the Respondent No.1 that a job will be offered to Michael as a Watchman with salary of Rs.500/- p.m. Thereafter, the accused No.1 i.e. Respondent No.1 went away and another person i.e. Respondent No.2 herein entered the office. He forced Michael to sign certain papers and due to fear, Michael signed the papers

without going through it. According to the case of the prosecution, Michael was not in a position to fluently read English language and he was not in a position to understand the contents of the papers. According to the case of the prosecution, 14 papers were signed by Michael. While Michael was signing the papers, the persons who brought Michael to the office of the Respondent No.1 were standing behind him and were threatening him. After he came out of the room, he saw Smt.Matilda with a broker. The said Michael was made to sit in a ambassador car and his sister and the two persons also got into the car. Michael was taken to the Government office at Bandra (West) where one person in the office told Michael to sign the papers. The sister of Michael also signed three papers and thereafter Michael was brought to the office of the Respondent No.1. The Respondent No.2 went inside the cabin of the Respondent No.1 and while coming back he asked Michael to accompany him and assured that he will drop Michael at his residence. When Michael reached near his house, he found that his wife was not in the house and the room was locked. One of the persons who was present broke open the lock and said that Michael will be given a new lock. Immediately thereafter, the persons waiting there entered the house and started removing the property and household articles from the room occupied by Michael. Due to fear Michael did not raise any objection. His articles were put in one tempo brought by the Respondent No.1. Michael and his belongings were brought to one room in

Kalicharan chawl and the said room was shown to him sometime in March 1988. However, Michael had not accepted the said room. His belongings were taken to the said room and were dumped in the said Kalicharan Chawl. Michael reported this fact to his sister-in-law. Thereafter, Michael went to Bhatia Hospital for taking medical treatment. After F.I.R. was registered, one Mr.Pawar, Police Officer, Bandra Police Station carried out the investigation. Both the accused were charged with offence punishable under Sections 365, 394, 452 read with section 34 of I.P.C. or in the alternative Sections 107, 109 of I.P.C. The accused No.2 was also charged with offence punishable under Section 327 of I.P.C.

6. The case of the defence appears to be that the said Michael voluntarily came to the office of the Respondent No.1 and signed the documents in question. The case is that the said Michael on his own went to the office of Sub Registrar and signed the documents for registration. The learned Magistrate on scrutiny of the evidence and on appreciation thereof passed the order of acquittal.

7. The learned Counsel for the Petitioner has made various submissions. He submitted that the learned Magistrate has committed an error by not discussing the evidence of Defence Witness No.1 on the ground that he was not able to believe him. He submitted that falsity in the defence of the accused

is proved by the said evidence and thus the link in the prosecution case is established. He submitted that the evidence of the Investigating Officer is not at all considered by the learned Judge. He pointed out that the observations made by the learned Magistrate in paragraph No.31 regarding statements made in the cross examination of P.W.No.2 Sylvia Walter Gonsalves are completely incorrect. He pointed out that the learned Judge has misread the F.I.R. and in fact the F.I.R. discloses the threat given by the Respondent No.1 to Michael. He submitted that the evidence of P.W.No.1 and evidence of panch witnesses is not at all considered. He invited my attention to the application made by Smt.Matilda by which she sought permission to examine herself. He pointed out that the said application was allowed and later on the said witness declined to appear on the ground of her alleged illness. He submitted that no fault can be found with the prosecution for non-examination of the said witness. He submitted that while recording the contradictions and omissions, the procedure laid down by the law of land has not been followed and therefore no reliance can be placed by the defence on the so called contradictions and omissions. He submitted that non-examination of Smt.Matilda by the prosecution is due to the fact that the Court allowed her application for recording her evidence as a Court witness. He submitted that the Trial Court could not have found fault with the prosecution for not examining Dan Pereira as prosecution

witness in as much as he was sought to be examined as Defence Witness. He submitted that the prosecution was not expected to examine the said witness. The learned Counsel for the Applicant has invited my attention to the marked portion of the statement of the witness Smt.Pawlin Luice (P.W.No.4). He invited my attention to the evidence of the said witness. He has placed reliance on various decisions of this Court, a reference to which will be made at a later stage.

8. The learned Counsel for the Respondent Nos.1 and 2 has invited my attention to various findings recorded by the learned Magistrate.

9. A reference will have to be made to various decisions relied upon by the learned Counsel for the Applicant. He relied upon the decision of the Apex Court reported in 1997 S.C.C. (Cri) page No.870 (Kaptan Singh And others Vs. State of M.P. and another). Placing reliance on the said decision he submitted that the revisional jurisdiction of the High Court can be invoked by the private complainant against the order of acquittal. He submitted that in a case there is manifest illegality or gross miscarriage of justice, the High court can interfere in Revision Application under section 401 of the Code of Criminal Procedure,1973. He submitted that there are illegalities causing miscarriage of justice and therefore this was an exceptional case where interference can

be made under section 401 of the said Code.

10. At this stage, reference will have to be made to the decision of the Apex court reported in 1988 S.C.C. (Cri) page No.1574 (Vimal Singh Vs. Khuman Singh and another). Paragraph 9 of the said decision reads thus :

"9. **Coming to the ambit of power of the High Court under Section 401 of the Code, the High Court in its revisional power does not ordinarily interfere with judgments of acquittal passed by the trial court unless there has been manifest error of law or procedure. The interference with the order of acquittal passed by the trial court is limited only to exceptional cases when it is found that the order under revision suffers from glaring illegality or has caused miscarriage of justice or when it is found that the trial court has no jurisdiction to try the case or where the trial court has illegally shut out the evidence which otherwise ought to have been considered or where the material evidence which clinches the issue has been overlooked. these are the instances where the High Court would be justified in interfering with the order of acquittal.** Sub-section (3) of Section 401 mandates that the High Court shall not convert a finding of

> acquittal into one of conviction. Thus, the High Court would not be justified in substituting an order of acquittal into one of conviction even if it is convinced that the accused deserves conviction. No doubt, the High Court in exercise of its revisional power can set aside an order of acquittal if it comes within the ambit of exceptional cases is to order retrial. In fact, sub-section (3) of Section 401 of the Code forbids the High Court in converting the order of acquittal into one of conviction..." (Emphasis supplied)

In another decision of the Apex Court reported in 1975 Cr.L.J. page 580 (Satyendra Nath Dutta and another Vs. Ram Narain), it is reiterated that in the revisional jurisdiction, no interference can be made unless there is manifest illegality. In a decision of the Apex Court reported in A.I.R. 1986 S.C. page 1721 (Bansi Lal and others vs. Laxman Singh). The Apex Court held as under :

> **"...9. It is only in glaring cases of injustice resulting from some violation of fundamental principles of law by the trial court, that the High Court is empowered to set aside the order of the acquittal and direct a retrial of the acquitted accused. From the very nature of this power it should be exercised**

sparingly and with great care and caution...."

11. The learned Counsel for the Applicant placed reliance on the decision of Single Judge of this court reported in 2005 All MR (Cri) page No.1760 (Smt.Kisnabai wd/o. Vithoba Gaydhane & Another vs. Vithoba s/o. Goma Gaydhane) which holds that if material evidence is ignored by the Trial Court in reaching the conclusion, the revisional court can certainly examine material evidence for reaching a finding of fact. However, this decision will not help the Applicant as it arose in a Revision against an order made under Section 125 of the said Code of 1973. In the present case, this Court cannot convert order of acquittal into conviction.

12. He pressed into service various decisions of the Apex Court and this Court as regards consideration of evidence of hostile witness. One of the decision relied upon by him is reported in 2000 Vol.102 (1) Bombay Law Reporter page No.822 (Vasanta @ Kallu s/o Mahu Uikey vs. State of Maharashtra) and in particular paragraph No.10 thereof. This court held that the evidence of prosecution witness declared hostile should not be thrown on the ground that his evidence cannot be relied upon and part of the evidence of the hostile witness can be relied upon by the prosecution which is in conformity with other evidence. There cannot be any second opinion about the said proposition of law laid down by this Court. He has

invited my attention to the decision of the Apex Court reported in A.I.R. 1959 S.C. page 1012 (Tahsildar Singh and another vs. State of Uttar Pradesh). In the said decision the Apex Court has considered the scope of Section 162 of the Code of Criminal Procedure, 1898 and Section 145 of the Indian Evidence Act, 1872. He has pressed into service the said decision to show that the procedure as contemplated by the Apex Court has not been followed. He submitted that undue importance cannot be given to discrepancies and contradictions in the evidence of the witnesses as the said discrepancies are natural discrepancies. He relied upon the decision of Division Bench of Gujrat High Court reported in 1990 (1) page 83 (State Vs. Bharwad Jakshibhai). He also placed reliance on another decision of the Apex court reported in A.I.R. 1976 S.C. page 1541 (Boya Ganganna and another Vs. State of Andhra Pradesh).

13. It must be said that the perusal of the impugned Judgment and order shows that the learned Judge has extensively referred to the evidence of material witnesses. The grievance is made regarding non-consideration of the evidence of P.W.12 Chandrakant Sambhaji Pawaskar and P.W.10 Bhakanna Vasvang Patil. Perusal of the paragraph No.49 of the Judgment and the perusal of the other parts of the Judgment shows that the evidence of the said witnesses has been considered and all that can be said is that there is no separate paragraph in the

Judgment which deals with the evidence of the said witnesses. The perusal of the notes of the evidence of the said witnesses shows that no failure of the justice has been occasioned merely because the learned Judge has not reproduced what has been stated by the said witnesses.

14. Reference will have to be made to the findings recorded by the learned Judge in paragraph Nos.45 and 46 of the impugned Judgment and Order. It is important to note that apart from observing that there is no general rule that person who was anticipating death is not likely to state lie, the learned Judge has considered the evidence of Michael. The observation of the learned Judge is that it is difficult to believe that the person can be abducted in a broad daylight in the city like Mumbai and can be dragged in a rickshaw which was brought there after sometime. The learned Judge observed that it is very difficult to believe that after forcing him to sign certain documents, he could be taken to Sub Registrar's office and made to sign there. In my view, the said observation may not be based on any specific evidence on record but nevertheless it cannot be said to be altogether irrelevant.

15. The learned Judge has referred to the evidence of the first informant Michael extensively. The observation of the learned Judge is that even according to Michael he did not

object to the goods being dumped in a tempo. The learned Judge has held that while the goods were being taken to the chawl by a tempo, the first informant Michael and his wife went on foot to the said chawl and belongings of Michael in his room were admittedly dumped in the said chawl. The material on record shows that after lodging of F.I.R. Panchnama was drawn at the site and thereafter, Michael took the police to Kalicharan Chawl and Michael opened the room where his articles were stored.

16. The learned Judge has referred to the evidence of P.W.No.2 Sylvia and has come to the conclusion that as per the initial part of her evidence, the impression is gathered that according to the said witness, Michael had no share in the property held by his sister Smt.Matilda. The learned Judge has not discarded the evidence of D.W.No.1 only on the ground that she was declared hostile. The evidence has been discarded on the ground that even otherwise also the said evidence does not reveal anything important which could have bearing on the proof of facts relating to the offence. The evidence of P.W.No.3 Opelia and P.W.No.5 Jean Tony is mainly on the point of demolition of the structure which was earlier occupied by the said Michael. It has come on record in the deposition of the said witnesses that they saw Smt.Matilda waving good bye to her neighbours. The learned Judge has given reasons for disbelieving the testimony of P.W.No.3. In

paragraph No.24 the learned Judge has referred to the evidence of Panch Witness who deposed in his cross examination that he was not aware of the contents of the Panchnama. The evidence of Medical Officer i.e. P.W.No.9 Smt.Sunita Maganlal Bharucha has also been considered and the learned Judge has referred to the cross examination of the said witness in which she has admitted that the injury to the said Michael was minor. The Medical Officer stated that injury on the person of Michael was possible by fall and it was possible if the body comes into contact with hard and blunt substance. The Medical Officer opined that the injury can be self inflicted also. Therefore, the learned Judge held that the injury by itself cannot be treated as conclusive evidence of commission of offence on the part of the Respondent Nos.1 and 2.

17. In so far as non-examination of Smt.Matilda is concerned, it must be noted here that after the closure of the evidence on the side of the prosecution, i.e. 24th February 1993, Smt.Matilda made an application praying that she may be permitted to examine herself as a Court witness and to bring the truth before the Court. It is to be noted here that it cannot be said that the prosecution did not examine the said witness as the witness herself had offered to depose as court witness. In fact the last defence witness was examined on 12th January 1993. Thereafter Mrs.Matilda applied for examining herself as Court witness. The said witness

expressed inability to attend the court by filing an application on 24th November 1993. Thereafter, no attempt is made to examine the said witness. It cannot be disputed that the said witness was a material witness and therefore, the learned Judge was right in finding fault with prosecution for not examining the said witness. It is pertinent to note that relying upon the evidence of Defence Witness Dan Pereira, the learned A.P.P. made an application for site inspection under section 310 of the Code of Criminal Procedure, 1973 which came to be rejected later on.

18. In my view the evidence of material witnesses has been appreciated by the learned Trial Judge. There is no manifest illegality committed by the learned Trial Judge. There is no procedural error on the part of the learned Trial Judge. It is pertinent to note that this is not an Appeal against acquittal. Even in a case of an Appeal against acquittal, merely because another view is possible to be taken on the basis of the evidence led by the prosecution, no interference is permitted with the order of acquittal. The Apex Court in case of Bansi Lal and others Vs. Laxman Singh reported in A.I.R. 1986 S.C. page 1721 held that power of the High Court under Section 401 of the said Code to set aside the order of acquittal is be used sparingly. In the facts of the present case, the evidence of the prosecution witnesses makes the prosecution case doubtful. Some material witnesses have not

been examined by the prosecution.

19. There is no merit in the Revision Application and the same is dismissed.

20. It is made clear that the observations which are made in this Judgement and the finding which are recorded are only for the purposes of consideration of this Revision Application and it will not affect any other proceedings between the parties.

JUDGE